Martin Saxe

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 16—Original.

Ex Parte:

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

AND

PETITION FOR WRIT OF MANDAMUS AGAINST THE HONORABLE LEARNED HAND AND THE HONORABLE AUGUSTUS N. HAND, UNITED STATES CIRCUIT JUDGES, AND THE HONORABLE WILLIAM BONDY, DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MARTIN SAXE,
HENRY L. MOSES,
ROBERT C. BEATTY,
HERMAN G. KOPALD,
EDWARD F. COLLADAY,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. —Original.

Ex Parte:

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,

Petitioner.

Application for a Writ of Mandamus against the Honorable Learned Hand and the Honorable Augustus N. Hand, United States Circuit Judges, and the Honorable William Bondy, a District Judge of the United States District Court for the Southern District of New York.

MOTION FOR LEAVE TO FILE.

COMES NOW the petitioner, above named, and moves the Court for leave to file its duly verified petition, annexed hereto, praying a writ of mandamus, and moves the Court that a rule be entered and issued directing the Honorable Learned Hand, Circuit Judge, the Honorable Augustus N. Hand, Circuit Judge, and the Honorable William Bondy, a Judge of the United States District Court for the Southern District of New York, to show cause why a writ of mandamus should not issue requiring them to reconvene

as a statutory court of three judges, as provided by Section 266 of the Judicial Code (Sec. 380, Title 28, of the United States Code), for the final hearing and determination of the case of The Public National Bank of New York against Andrew B. Keating, as Receiver of Taxes of the City of New York, and William Reid, Jr., as City Collector, pending in the United States District Court for the Southern District of New York, in Equity, in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief in the premises as may be just.

Respectfully submitted,

MARTIN SAXE,
HENRY L. MOSES,
ROBERT C. BEATTY,
HERMAN G. KOPALD,
EDWARD F. COLLADAY,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1928.

No. —Original.

Ex Parte:

IN THE MATTER OF

THE PUBLIC NATIONAL BANK OF NEW YORK,

Petitioner.

PETITION FOR WRIT OF MANDAMUS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of THE PUBLIC NATIONAL BANK OF NEW YORK, in the City of New York, State of New York, respectfully shows:

I.

The petitioner, The Public National Bank of New York, is a national banking association duly organized, incorporated and existing under and by virtue of the National Bank Act, with its principal office and place of business located in the Borough of Manhattan, City of New York, and is, under the laws of the United States, a citizen of said State of New York and a resident of said City of New York.

II

The petitioner, on behalf of itself, its stockholders and all other national banks in the State of New York, and the stockholders thereof, similarly situated, filed on December 29, 1926, its bill in equity in the United States District Court for the Southern District of New York against Andrew B. Keating, the Receiver of Taxes of said City of New York, subsequently adding William Reid, Jr., the City Collector, as co-defendant, seeking to enjoin the defendants (the legally and duly authorized officers for the collection of taxes assessed and levied against the shares of national banks in said City of New York) and either of them from the collection of said taxes against petitioner's shares and statutory penalties thereon. This case is a test case involving the constitutionality of the New York Tax Law, a State-wide statute, Chapter 60 of the Consolidated Laws of New York, as amended by Chapter 897 of the Laws of 1923, in force from 1923 to 1926, inclusive, whereby the shares of national banks are taxed 1% based on the capital, surplus and undivided profits of the bank. The attack is upon discrimination arising out of the more favorable taxation of other moneyed capital in the hands of individual citizens of the State coming into competition with the business of national banks, in violation of Section 5219, U. S. Revised Statutes.

> *First National Bank* v. *Hartford*, 273 U. S. 548.
> *Minnesota* v. *First National Bank of St. Paul*, 273 U. S. 561.

As construed by the Court of Appeals of the State of New York and applied, the petitioner alleges and contends the said Tax Law relieves a vast bulk of such competing moneyed capital from equivalent taxation and thus discriminates against national bank shares contrary to said Federal statute.

> *People ex rel. Pratt* v. *Goldfogle et al.*, 242 N. Y. 277, and companion cases, 242 N. Y. 540-546, decided March 30, 1926.

The relevant provisions of the Tax Law of the State of New York are printed as Schedule "C" to this petition.

The Printed Transcript of the complete record for final hearing in said cause (in two volumes) is submitted herewith as Schedule "D" to this petition. The bill of complaint will be found at pages 1 to 18 of the Printed Record.

III.

An application for an interlocutory injunction order, on notice to the Governor and Attorney General of the State of New York, based on said bill in equity, was made to District Judge William Bondy, who called to his assistance Circuit Judge Charles M. Hough and Judge Augustus N. Hand, then a District Judge (Application for Interlocutory Injunction, Printed Record, pp. 27-34; Bill in Equity, Record, p. 1). That Court, all the Judges thereof concurring, duly granted the interlocutory injunction order on January 24, 1927, restraining the defendant "in the enforcement and execution of the provisions of the Tax Law of the State of New York involved herein and from enforcing or taking any steps to enforce the collection of said taxes and penalties referred to in said bill of complaint," etc. (Record, p. 35). The Court unanimously denied the defendants' motion to dismiss the bill of complaint on April 1, 1927 (Record, pp. 58-59). Thereafter, Judge Hough became incapacitated, and Circuit Judge Learned Hand was substituted in his place, and later Judge Augustus N. Hand became a Circuit Judge. The cause was referred to a Special Master on April 9, 1927, to take the proofs and report findings of fact (Record, pp. 63 and 66), and testimony and evidence were completely taken but the Special Master died before making his report (Record, p. 72). At the suggestion of the statutory court of three judges, the whole record was reduced in compliance with Equity Rule 75b and printed for the statutory court in the form for the United States Supreme Court in preparation for a direct appeal to this Court. The cause thereafter on July 9, 1928, came on for final hearing before the statutory court so constituted upon the

proofs as taken by the Special Master and was argued (Record, p. 72). Thereupon the Judges of their own motion raised the question whether the cause arose under Section 266 of the Judicial Code, and whether, therefore, the two Circuit Judges had any jurisdiction in the premises. Upon consideration of said question, said statutory court decided, on July 24, 1928, that the suit was not one to which Section 266 of the Judicial Code applies and ordered that the statutory court hitherto convened to hear the same be dissolved, and that the cause proceed before a single District Judge. The order of said Court to that effect is Schedule "A" hereto and the opinion which accompanied it is Schedule "B" hereto.

In the plaintiff's brief on final hearing before the statutory court, the following statement and citation of authorities in support of a court of three judges for this case was made:

> "As this suit, brought to restrain officers of the state, involved the constitutionality of the Tax Law of the State of New York, *as construed and applied*, the application for a preliminary injunction was necessarily made to a court of three judges, and the papers were served upon the Governor and the Attorney General of the State of New York, under Section 380, Title 28, of the United States Code (Sec. 266, Judicial Code). The Attorney General appeared herein throughout the proceedings. See recent U. S. Supreme Court decisions: *Gulf Fisheries Co. v. D. B. MacInerney, County Attorney*, 72 L. ed. (Adv.) 288 (Feb. 20, 1928); *Marcus Brown Co. v. Feldman*, 256 U. S. 170, aff'g 269 Fed. 306, suit against the District Attorney; *Chicago, M., St. P. & P. R. R. Co. v. Risty, County Commissioner*, 72 L. ed. (Adv.) 365 (April 9, 1928); *St. Louis & S. W. Ry. Co. v. J. H. Nattin, Tax Collector* of a road district, 72 L. ed. (Adv.) 541 (May 14, 1928); *Ex parte Ruder*, 271 U. S. 461; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278. City officers are called in the opinion 'State' officers.
>
> This is a case of importance and unusual gravity, requiring special treatment in the interest of the public, as it affects the taxation of all national

bank shares held by thousands of stockholders, from 1923 to 1926. See *Ex parte J. D. Collins*, U. S. Supreme Court, June 4, 1928."

IV.

The gravamen of the bill of complaint is, that a State-wide statute, to wit, the Tax Law of the State of New York (being Chap. 60 of the Consolidated Laws), as amended by a State-wide statute, to wit, Chapter 897 of the Laws of 1923, in respect of the taxation of national bank shares and other moneyed capital in the hands of individuals coming into competition with the business of national banks, *as said statute was construed and applied in the City of New York and throughout the State*, authorized discrimination and in fact discriminated against national bank shares in their taxation, in violation of the restriction of Section 5219 of the Revised Statutes of the United States and the Constitution of the United States, and furthermore, in violation of the Fourteenth Amendment thereof (Complaint, Part "Second," par. 6, subds. (a) and (b), Record, pp. 4-5).

The said bill of complaint alleges that "said Commissioners of Taxes and Assessments (of the City of New York) in making said assessments upon national bank shares, and upon said other moneyed capital, for the year 1926 in said City of New York, *complied with the provisions of said Tax Law, as construed*" (Complaint, Part "Third," par. 12, Record, pp. 12-13).

V.

The statute under which petitioner's shareholders were assessed, imposed an *ad valorem* tax upon bank shares of 1%, measured by the capital, surplus and undivided profits of the bank, uniform throughout the State. In *People ex rel. Hanover National Bank* v. *Goldfogle et al.*, 234 N. Y. 345; certiorari denied, 261 U. S. 620, this was held to be a discriminatory tax in violation of Section 5219 of the United States Revised Statutes, for the reason that in 1919 all competing moneyed capital (except State bank shares and trust companies) had been exempted

from *ad valorem* taxation, and was taxed only so far as the income thereof might be reached if and when included in net income taxable under the personal income tax and the corporation income tax.

In said *Hanover National Bank* decision the Court said (at p. 354):

> "In a very considerable number of cases the valuation tax must inevitably be the heavier burden. It is fixed and certain. The income tax is variable and dependent on income and amount of income. It is conceivable that when returns on such capital are low, the bank stock would be taxed and the competing capital would be exempt. In no event would equality exist unless the income on competing capital were large beyond the dreams of avarice and the usual returns on investments."

Thereupon, by Chapter 897, Laws of 1923, an *ad valorem* tax of 1% was imposed upon "moneyed capital coming into competition with the business of national banks," without further description or definition of what was thereby sought to be taxed.

In *People ex rel. Pratt* v. *Goldfogle et al.*, 242 N. Y. 277, and companion cases, 242 N. Y. 520-546 (decided March 30, 1926), said Chapter 897 was construed as *not* applying to various types of business employment of moneyed capital and personal investment thereof which petitioner contends are competitive, and out of eight test cases only one assessment was upheld, to wit, that of a private banker.

The effect of such construction of the statute by the highest court of the State, with the limitation necessarily imposed thereby upon the authority of assessing officers, the petitioner alleges and contends is that

(a) the great bulk of said other competitive moneyed capital in the City and State of New York, *totaling billions of dollars*, relatively material in amount in comparison with the capitalization of the national banks therein, used in the various businesses,

transactions, operations and investments like those in which national banks engaged both in New York City and throughout the said State where national banks are located, was excluded from the operation of said statute and only a very small part of it, in rare and exceptional instances, subjected to equivalent taxation. From 1923 to 1926, inclusive, under said Tax Law, as amended as aforesaid, said great bulk of such competitive moneyed capital so excluded from any *ad valorem* taxation whatsoever, was only subjected to income taxation if and when it yielded any taxable net income. In the case of individuals the net income tax rates were, 1% on the first $10,000, 2% on the next $40,000, and 3% on all additional net income. In the case of corporations the net income tax rate was 4½%. Said income tax rates can only yield taxes equivalent to the 1% *ad valorem* tax imposed on bank shares when the net income of individuals is 100%, 50% and 33⅓% on the capital, according to the respective classes of personal income, and 22¼% on the capital of corporations (Complaint, Record, p. 5);

(b) in 1926, the moneyed capital assessments made in the City of New York totaled only 150 against individuals (substantially all of whom were in the business of banking) and 100 against financial corporations, in the total sum of approximately $50,000,000 for each class; and in all the other taxing districts in the State, only 60 individual and 17 corporation moneyed capital assessments were made in the grand total of approximately $1,750,000 (Stipulation of Facts, Record, pp. 218-219);

(c) in 1926 there were 542 national banks in the State, with thousands of stockholders, all assessed upon the value of their respective shares, based on the capital, surplus and undivided profits of their respective banks, in the approximate total of $700,000,000, and taxed 1% thereon (Stipulation of Facts, Record, pp. 219 and 222).

VI.

That, as appears from the bill of complaint, said Chapter 897 of the Laws of 1923 was finally construed by the Court of Appeals in said *People ex rel. Pratt* v. *Goldfogle et al., supra*, decided March 30, 1926 (Record, pp. 8-12); that after the 1926 assessment of national bank shares, the earliest moment for equity to interfere, the petitioner promptly sought to enjoin the collection thereof. The 1926 assessment of the petitioner's said shares totaled $13,342,960.77, upon which the said taxes herein involved, at the statutory fixed rate of 1%, amounted to $133,429.61 (Record, p. 7). That the 1926 assessments of the shares of national banks in the City of New York totaled approximately $567,789,379.95 and in all other tax districts in said State, $133,000,000, making a grand total of about $700,000,000. In the years 1923 to 1925 such assessments of the shares in national banks ranged upwards from $485,975,395 in the City of New York and upwards from $121,802,044 in all other tax districts in said State (Complaint, Record, pp. 10-11). That under the construction and application of said State statute in force from 1923 to 1926, inclusive, the petitioner alleges and contends, the assessments of the shares of all national bank stockholders in said State during said years were in contravention of their rights under the laws and Constitution of the United States (Complaint, Record, pp. 4-5).

VII.

A further discrimination, under said Tax Law, against national bank shareholders, the petitioner alleges and contends, arises from the fact that the shares (except shares of State banks) of corporations competing with national banks were wholly exempted from taxation and only trust companies were subjected to equivalent taxation. Such other competing corporations being taxed only upon certain of their taxable assets, excluding all tax exempt securities and real estate, the petitioner alleges and contends there was not equivalent taxation of their shareholders, as national bank shares were assessed on the basis

of the inclusion of all capital assets of every kind and nature (Complaint, Record, pp. 5, 6, 12 and 13).

VIII.

The question of the mandatory inclusion of the real estate of the bank within the State (separately assessed and taxed to the banks) in the assessed valuation of the shares, is here directly involved. Under the taxing statute herein, the petitioner alleges and contends, neither from its text nor its construction were the assessors compelled to include the value of any real estate within the State or otherwise held by competing corporations, in the assessment of their moneyed capital. While this Court has apparently never had occasion to directly pass upon the question of the inclusion of the real estate of national banks in the assessment of their shares (which real estate is separately taxed as such), the petitioner contends it was clearly indicated in *First National Bank of Albuquerque* v. *Albright*, 208 U. S. 548, at pages 552-553, that real estate taxed to the bank is "meant to be deducted by Rev. Stat. §5219." While most of the States have followed that interpretation of said Section 5219, the petitioner alleges and contends the State of New York disregarded it during the years 1923 to 1926, inclusive, and the real estate within the State of national banks in New York represents a very substantial part of their paid-in capital (Complaint, Record, pp. 13 and 14).

IX.

That the question of the alleged unconstitutionality and illegality of said taxes for the years 1923, 1924, 1925 and 1926 under said State statute, as construed and applied, in the City of New York and throughout said State, is one of common and general interest to many persons in said State, comprising thousands of national bank stockholders.

X.

The suit is one to restrain "the enforcement, operation, or execution of" a statute of the State of general applica-

tion throughout the State, within the meaning of Section 266 of the Judicial Code. It is a case "of special importance and requiring special treatment in the interest of the public" (*Ex parte Collins*, United States Supreme Court, decided June 4, 1928).

We respectfully submit that the instant case is just such a case as Section 266 of the Judicial Code was designed to meet. It is a test case to settle the constitutionality of an important part of the general tax law of the State of New York imposing a tax on shares of national banks. It is not a case where further local legislative action is required under an enabling state statute, as in the *Collins* case, *supra*, but one where the state statute itself is directly involved in the question of the alleged unconstitutionality. Thus the petitioner has sought to directly restrain the "enforcement, operation, or execution" of a statute of the State by officers of the State within the meaning of Section 266.

A prompt final determination herein is highly desirable in the public interest in order to settle the question of the validity of all national bank stock taxes in said State, from 1923 to 1926, inclusive, involving the claims of thousands of national bank stockholders, aggregating many millions of dollars.

The petitioner is advised that the Attorney General of New York will present on behalf of the People of the State of New York a joinder in this motion and petition and representation in support thereof.

XI.

By reason of all the facts herein stated, the United States District Court for the Southern District of New York, the petitioner believes, is without jurisdiction to hear and determine said cause upon the final hearing without the presence of three judges, as required by Section 266 of the Judicial Code (Sec. 380, Title 28, U. S. Code). The petitioner has no means of relief except by application for a writ of mandamus.

The petitioner prays that a writ of mandamus may issue out of this Court, directed to the Honorable Learned Hand, Circuit Judge, the Honorable Augustus N. Hand, Circuit Judge, and the Honorable William Bondy, District Judge, requiring them to reconvene as the statutory court herein for the determination of said cause on the final hearing, as provided by Section 266 of the Judicial Code (Sec. 380, Title 28, U. S. Code).

THE PUBLIC NATIONAL BANK
OF NEW YORK,

By WALTER G. FERENS,
Cashier and Vice-President,
Petitioner.

MARTIN SAXE,
HENRY L. MOSES,
ROBERT C. BEATTY,
HERMAN G. KOPALD,
EDWARD F. COLLADAY,
Counsel for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WALTER G. FERENS, being duly sworn, deposes and says: That he is the Cashier and Vice-President of the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that deponent derives his knowledge of the allegations therein set forth from statements made to him by counsel, officers, agents and employees of the petitioner, and from information acquired by him in the performance of his duties; that the reason why this verification is made by deponent and not by the petitioner, is that petitioner is a national banking association and deponent is an officer thereof, to wit, its Cashier and Vice-President.

WALTER G. FERENS.

Sworn to before me this
24th day of September, 1928.

J. C. RUBEN,
Notary Public, New York County No. 265.
Commission expires March 30, 1929.
(Notarial Seal)

SCHEDULE "A."

Order Dissolving Court of Three Judges.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PUBLIC NATIONAL BANK OF NEW YORK,
Plaintiff,

against

ANDREW B. KEATING, as Receiver of Taxes of the City of New York, and WILLIAM REID, JR., as City Collector,
Defendants.

This cause came on to be heard at the July, 1928, term of this court and was argued and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that, it appearing that the suit is not one to which Section 266 of the Judicial Code applies, the statutory court hitherto convened to hear the same be and the same hereby is dissolved, and that the cause do proceed before a single district judge.

July 24, 1928.

LEARNED HAND,
Circuit Judge.

AUGUSTUS N. HAND,
Circuit Judge.

WM. BONDY,
District Judge

SCHEDULE "B."

Opinion Dissolving Court of Three Judges.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PUBLIC NATIONAL BANK OF NEW YORK,
Plaintiff,

against

ANDREW B. KEATING, as Receiver of Taxes of the City of New York, and WILLIAM REID, JR., as City Collector,
Defendants.

E 39-380

Before: L. HAND and AUGUSTUS N. HAND, Circuit Judges, and BONDY, District Judge, sitting as a statutory court constituted under Section 266 of the Judicial Code.

On final hearing of a bill in equity to enjoin the Receiver of Taxes of the City of New York and its City Collector from collecting a tax upon the shares of the plaintiff's stock levied for the year 1926 in accordance with chapter 897 of the laws of 1923 of New York.

The plaintiff is a National Bank and the bill alleges that the law of New York authorizing a tax of one per cent. upon its shares, as that act has been construed by the Court of Appeals of that State, and applied by the Commissioners of Taxes and Assessments of the City, is unconstitutional. This unconstitutionality depends first upon the assertion that so applied the law is not within the consent of Congress as manifested by Revised Statutes Section 5219, as amended in 1923, and second, that without that consent no tax whatever may be levied upon a National Bank or its shares. The bill further alleges that in

any event while all bank shares including the plaintiff's were assessed by the City Commissioners and a tax of one per cent. levied upon them the Commissioners omitted to assess the greater part of the moneyed capital in the City which came into competition with the business of National Banks, the plaintiff among the rest. Hence it resulted that the plaintiff was subjected to a discrimination contrary to the Act of Congress and the Fourteenth Amendment.

The district judge before whom came a motion for a preliminary injunction called to his assistance Judge Hough and Judge Augustus N. Hand, then a district judge. A preliminary injunction was granted, and a motion denied to dismiss the bill for lack of equity. Thereafter Judge Hough became incapacitated, and Judge Learned Hand was substituted in his place, and later Judge Augustus N. Hand became a circuit judge. The cause was referred to a master to take the proofs; he completed them before his death, but failed to prepare his report. The cause thereafter came on for a hearing before the statutory court so constituted upon the proofs as taken by the master. The judges of their own motion thereupon raised the question whether it arose under Section 266 of the Judicial Code, and whether therefore the two circuit judges had any jurisdiction in the premises.

MARTIN SAXE for the plaintiff.
WILLIAM H. KING for the defendants.

Per Curiam:

Section 266 of the Judicial Code so far as relevant reads as follows: "No * * * injunction * * * restraining the enforcement * * * of any statute of a State by restraining the action of any officer of such State in the enforcement * * * of such statute, or * * * of an order made by an administrative board or commission acting under * * * the statutes of such State shall be issued * * * upon the ground of the unconstitutionality of such statute" except by a court of three judges. It is apparent that three judges are necessary only when the suit is to restrain an "officer of such State" who proposes to enforce

a statute or the order of an administrative board. The Receiver of the City of New York and its City Collector are not officers of the State, except in so far as, like all other public officers, they indirectly derive their powers from the legislature. They are both appointed by the Comptroller of the City, himself an officer of the City. They have no duties except in respect of collecting the taxes levied by the City's assessing officers. Unless all municipal officials are within the class mentioned in the section, they are not.

Until the decision of the Supreme Court in Ex parte Collins, June 4, 1928, it was open to some doubt what was the proper meaning of the phrase. There had been some cases in which the defendants were local municipal officers and the merits had been considered; they are cited in Ex parte Collins with the comment that in none had the point been considered. Conversely, in other cases the cause had been disposed of by a single judge. We think that Ex parte Collins has settled the question. It is quite true that in that case the constitutionality of the statute was involved only through a municipal resolution which determined that a local improvement should be made, and it was held that the suit was one to enjoin the resolution itself, though the sole complaint was as to the procedure provided in the statute. Even if that were taken as the entire scope of the decision, the assessment for taxes by a board of the city tax assessors seems to us to be an "order of a city board" as that phrase was used. Upon this point the court cited with approval City of Dallas v. Dallas Telephone Co., 272 Fed. Rep. 410 (C. C. A. 5), a case which held that a court of three judges was not necessary to review the validity of the order of a city board of commissioners fixing telephone rates within the city. It appears to us that the assessment of a board of tax commissioners must be treated as of the same kind.

However, the scope of the decision is not to be so limited; it also held that "local officers" were not "officers of such State," when "the suit involves matters of interest only to the particular municipality or district involved." Upon this point the court cited Connor v. Board of Com-

missioners, 12 Fed. (2) 789 (D. C. S. D. of Ohio), in which the suit was to enjoin a board of county commissioners from proceeding to establish a sewerage district and to assess the cost upon adjacent lands. It was held that as the commissioners were local officers, Section 266 did not control, and two of the judges withdrew. This decision in turn rested upon an earlier ruling of the same court, (Connecting Gas Co. v. Imes, 11 Fed. (2) 191), where the bill was of substantially the same kind as here. That is, it sought to enjoin five county treasurers from collecting taxes alleged to have been assessed by discriminatory assessments.

The only matter of doubt appears to us to be the meaning of the sentence quoted above, suggesting that the matter at stake must be of only local interest. The defendants are indeed local officers, but in accordance with very general practice the State collects her taxes in part through municipalities. To this extent therefore they act for the State, and the issue is of more than local interest. It may be that the language used was meant to cover the case of a local officer in whom was vested power to enforce statutes of State-wide concern, as, for instance, local State's attorneys. We do not, however, believe that it was meant to cover the fiscal officers of a city or county, merely because the State shared in their collections. That was probably the case in Connecting Gas Co. v. Imes, but it was held to be not enough. Were it so, the result would be that three judges must sit, and the Supreme Court hear appeals, in every case in which a taxpayer challenges on constitutional grounds the validity of any tax whatever, for the State shares in them all. This we regard as impossible. The recent decisions of the Supreme Court prove that it is acutely aware of the burden which a loose construction of the section will bring upon itself and upon the district courts. It would be a strained interpretation that let in all cases in which the State has an indirect and small concern.

Nor can we read the sentence quoted as meaning that the matter involves more than local interests, when as a precedent it may prove binding generally. Ex parte Col-

lins was itself such a case; a decision on the merits would have determined the validity of the State statute not only for the City of Phoenix, but for the whole State of Arizona. We think it enough to dispose of the case at bar to say that the conduct proposed to be enjoined is no more than the collection by local city officials of a tax primarily for the use of the city.

Therefore the two circuit judges will withdraw from the cause and the district judge will dispose of it like any other case in this court.

SCHEDULE "C."

Relevant Provisions of the Tax Law of the State of New York, Chapter 60 of the Consolidated Laws of the State of New York, as amended by Chapter 897 of the Laws of 1923, as effective in 1926.

ARTICLE 1.

TAXABLE PROPERTY AND PLACE OF TAXATION.

§ 4 a. *Exemption of intangible personal property.* Notwithstanding any provision of this chapter, or of any other general, special or local law, intangible personal property, whether referred to as personal property, capital, capital stock or otherwise, shall be exempt from taxation locally for state or local purposes, except shares of stock of banks or banking associations and except other moneyed capital coming into competition with the business of national banks, which shares and other moneyed capital shall be taxed locally for state or local purposes as prescribed by this chapter, provided that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this sec-

tion. This exemption shall be in addition to all other exemptions of personal property from local taxation, whether based upon the character, ownership or amount of property. The term "intangible personal property," as used in this section, means incorporeal property, including money, deposits in banks, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt.

ARTICLE 2.

Mode of Assessment.

§24. *Bank shares, how assessed.* The value of each share of stock of each bank and banking association, except such as are in liquidation, shall be ascertained and fixed by adding together the amount of the capital stock, surplus and undivided profits of such bank or banking association and by dividing the result by the number of outstanding shares of such bank or banking association. The value of each share of stock in each bank or banking association in liquidation shall be ascertained and fixed by dividing the actual assets of such bank or banking association by the number of outstanding shares of such bank or banking association. The owners of the stock of banks and banking associations shall be entitled to no deduction from the taxable value of their shares because of the personal indebtedness of such owners, or for any other reason whatsoever. This section is not to be construed as an exemption of the real estate of banks or banking associations from taxation. No shares of stock of such banks and banking associations, by whomsoever held, shall be exempt from the tax hereby imposed.

§24-b. *Bank shares; rate of tax.* The rate of tax upon the shares of stock of banks and banking associations shall be one per centum upon the value thereof, as ascertained and as fixed in the manner hereinbefore provided.

§24-e. *Bank shares; exemption from other taxes.* The said bank tax shall be in lieu of all other taxes whatsoever for state, county or local purposes upon the said shares of stock, and mortgages, judgments and other choses in action and personal property held or owned by banks or banking associations the value of which enters into the value of said shares of stock shall also be exempt from all other state, county or local taxation. • • •

§24-f. *Bank tax; collection and payment.* It shall be the duty of every bank or banking association to collect the tax due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county wherein said bank or banking association is located, except that in the city of Buffalo such tax shall be paid to the city treasurer of said city, and in the city of New York to the receiver of taxes thereof on or before the thirty first day of December in said year; and any bank or banking association failing to pay the said tax as herein provided shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for a sum, in addition to the amount of said tax, equal to five per centum thereof and for an additional sum equal to seven per centum per annum calculated upon the amount of said tax from the day upon which said tax became due and payable to the date of payment. Every bank or banking association so paying the taxes due upon the shares of its stock shall have a lien on the shares of stock, and on all property of the several share owners in its hands, or which may at any time come into its hands, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner. The tax shall be paid by the respective banks in the city of New York to the said receiver of taxes on or before the thirty first day of December in said year, and said tax shall be collected by the said receiver of taxes and shall be by him paid into the treasury of said city to the credit of the general fund thereof. The tax shall be paid by the respective banks in the city of Buffalo to the city treasurer

of said city on or before the thirty-first day of December in said year, and said tax shall be collected by the said treasurer and credited to the general fund of said city.

§25. *Moneyed capital other than shares of banks and trust companies; how assessed.* Moneyed capital coming into competition with the business of national banks, except shares of national banks and of banks or trust companies organized under the authority of this state, and except bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall be assessed at its actual value against the owners or holders thereof and such owners or holders shall be entitled to no deduction from such actual value because of the personal indebtedness of such owners or holders and in determining such actual value allowance shall be made for existing indebtedness incurred in the acquisition of such moneyed capital; and moneys deposited with a taxpayer, or securities in his possession as pledgee or bailee, shall not be included in determining the actual value of the moneyed capital owned or held by such taxpayer. No such moneyed capital by whomsoever owned or held shall be exempt from the tax hereby imposed.

§25-b. *Moneyed capital; rate of tax.* The rate of tax upon moneyed capital assessed as herein provided shall be one per centum upon the value thereof as ascertained and fixed in the manner hereinbefore provided.

§25-c. *Moneyed capital; exemption from other taxes.* The said tax on such moneyed capital as hereinbefore provided shall be in lieu of all other taxes whatsoever for state, county or local purposes on such moneyed capital.

ARTICLE 16.

Taxes upon and with Respect to Personal Incomes.

§351. *Imposition of income tax.* A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. * * *

§359. *Gross income defined.* The term "gross income":

* * * * * * *

2. Does not include the following items which shall be exempt from taxation under this article:

* * * * * * *

4. Income received as dividends on shares of banks and banking associations taxable as provided by article two of this chapter.

5. Income received from moneyed capital taxable as provided by article two of this chapter, including money received as dividends, or a proportion of such dividends, of a corporation whose capital in whole or in part is taxable under such article.

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ARTICLE 9-A.

Franchise Tax on Business Corporations.

§208. *Definitions.* As used in this article:

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3. The term "entire net income" means the total net income, including * * * exclusive of income from dividends on shares of trust companies subject to franchise

tax as provided by section one hundred and eighty-eight of this chapter and income from dividends on shares of banks and banking associations taxable as provided by article two of this chapter, and income received from moneyed capital taxable under such article, including dividends, or a proportion of such dividends, of a corporation whose capital in whole or in part is taxable under such article, • • •.

§215. *Rate of tax.* The tax imposed by this article shall be at the rate of four and one-half per centum of the entire net income of the corporation or portion thereof taxable within the state, determined as provided by this article, unless taxable upon its capital stock at the rate of one mill or subject to the minimum tax of ten dollars, as provided in section two hundred and fourteen of the tax law.